

KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3215
—
(202) 326-7900
FACSIMILE:
(202) 326-7999

September 10, 2024

The Honorable Margaret M. Garnett
United States District Court for the Southern District of New York
40 Foley Square, Room 2102
New York, NY 10007

Re: *fuboTV Inc., et al. v. The Walt Disney Company, et al.*, No. 24-cv-1363

Dear Judge Garnett:

Pursuant to Your Honor's Order, Doc. 294, the parties respectfully submit this joint letter setting forth their respective positions on scheduling in advance of the September 12 conference. The parties' proposed schedules are set forth in Appendix A to this letter.

Plaintiffs' Position: Defendants have informed Fubo that they intend to move to dismiss Fubo's claims in lieu of filing answers. Fubo will oppose those motions and has agreed to Defendants' proposed briefing schedule (as set forth in Appendix A). Fox also, for the first time after seven months of litigating this case, has informed Fubo that it intends to move to transfer Fubo's claims against Fox to the Central District of California. Fubo will oppose that motion if and when Fox files it; Fubo submits that it would be most efficient to brief any such motion on the same schedule as Defendants' motions to dismiss. In all events, briefing on any motions Defendants may file should not impact the discovery schedule in this case.

Fubo respectfully submits that the parties have already engaged in substantial discovery, and that the remaining discovery can be completed within the timeframe suggested by the Court in its August 26 order and in accordance with the Court's Civil Case Management Plan and Scheduling Order ("Order")—assuming appropriate cooperation from Defendants and third parties. Fubo believes that the parties can reasonably complete discovery by February 2025. This would allow for four months of fact discovery (the default maximum under Section 5(e) of the Order) followed by 1.5 months of expert discovery (the default maximum under Section 8(a)).

To date, the parties (including third parties) have produced more than 515,000 documents and taken 28 depositions. While this discovery focused on Defendants' joint venture, much of this discovery bears on Fubo's tying and MFN claims (in large part because Defendants insisted on disputing at the hearing that they force distributors to bundle their channels together). Fubo

September 10, 2024

Page 2

expects that the parties will be able to leverage this existing discovery to narrow the scope of future discovery related to Fubo's tying and MFN claims. For example, Fubo has already offered to limit the scope of any depositions of witnesses who have already been deposed once.

Fubo's proposed schedule is reasonable given the remaining needs of discovery. At this juncture, Fubo expects to seek additional discovery on the following subjects: (1) Defendants' bundling practices and negotiations with distributors; (2) Defendants' MFN clauses and "round-tripping" arrangements with certain distributors; (3) developments regarding the JV since April 30, 2024 (the original cutoff date for custodial document productions); and (4) data and information that Fubo's experts may use for market analyses. (Fubo reserves the right to identify and pursue additional categories of discovery as it continues to investigate its claims.)

Defendants, by contrast, have proposed a lengthy schedule in which discovery would not end until June 2025 and trial would not occur until October 2025. Defendants offer no meaningful basis for this leisurely pace. Defendants suggest that discovery on their bundling practices must "go back decades," but Fubo's tying claims concern carriage agreements signed in the past four years. Defendants also offer a laundry list of issues they intend to explore in discovery, but many of these are simply variations on a single theme. And much of the discovery Defendants say they intend to take appears overbroad: for example, Defendants have suggested that they may issue subpoenas to every participant in each relevant market. Defendants' excessive discovery demands will consume unnecessary time and impose needless costs. The parties will benefit from a schedule that demands efficiency and will not permit obfuscation and foot-dragging.

Indeed, Defendants have obtained expedited briefing on their appeal of this Court's injunction order by arguing that "time is of the essence" to resolve this case. *See Unopposed Emergency Motion to Expedite Appeal, Case No. 24-2210 (filed Aug. 27, 2024).* But here they tell a different story, proposing a laggardly schedule that will not provide an outcome until early 2026.

Fubo is concerned that Defendants seek to delay and deflect via scorched-earth discovery and motion practice. Fubo respectfully urges the Court to keep this case on an efficient and expeditious track, just as it did with the PI hearing. The parties capably completed discovery in advance of that hearing in roughly three months, *see Doc. 140*; they should be able to complete remaining discovery within six. The case can then be ready for trial by early 2025, consistent with the Court's suggestion in its August 26 Order, or at the very latest by mid-2025 (if Defendants continue to insist on seeking summary judgment).

Defendants' Position: Defendants intend to move to dismiss Fubo's Sherman Act Section 1 and Donnelly Act claims concerning (i) Disney's and Fox's bundling practices, which Plaintiffs assert constitute anticompetitive tying (Plaintiffs do not bring tying claims against WBD); and (ii) most-favored-nation ("MFN") clauses in certain carriage agreements. Those claims

September 10, 2024

Page 3

fail as a matter of law and should be dismissed, which would impact the scope of discovery going forward. Additionally, Fox intends to move to transfer Fubo's claims against Fox alone concerning the Fox-Fubo Carriage Agreement to the Central District of California pursuant to the exclusive forum selection clause in that agreement. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 66 (2013).

There has been little to no discovery into Fubo's tying and MFN claims. The limited PI discovery taken to date has related to the JV. PI discovery was thus limited to a one-year period during which Defendants discussed the proposed JV. But unlike the JV, each of the Defendants has engaged, separately, in their own licensing practices, and these practices have existed for decades, and when Fubo entered the market in 2015, which means that discovery for those claims must start much earlier than the discovery required for the PI. Nor are the topics of discovery the same. Fubo's tying claims require analysis of entirely different purported markets than the court has analyzed so far—namely, the upstream market for Commercially Critical Sports Channels (the purported tying product) and the upstream market for Non-Critical Television Channels (the purported tied product). Thus, the scope and focus of discovery will differ.

If Fubo's tying claims survive Defendants' motions to dismiss, there will need to be discovery on numerous disputed factual issues, including (1) whether there are separate product markets for Commercially Critical Sports Channels and for Non-Critical Television Channels; (2) whether Disney or Fox have market power in the tying market; (3) whether there are barriers to entry in the tied market and, if so, whether Disney's or Fox's practices have elevated those barriers to entry; (4) whether any potential competitor has been foreclosed from entering the tied market and, if so, what effect that had on overall competition; (5) the overall state of competition in the tied market and what impact, if any, Disney's or Fox's licensing practices have had on the price, quantity or quality of Non-Critical Television Channels; (6) Fubo's decision to enter the market understanding the industry's pre-existing bundling practices; (7) the ability of Fubo and other distributors to license Non-Critical Television Channels from programmers other than Disney and Fox; (8) whether, and to what extent, Fubo has been harmed by Disney's and Fox's practices and whether any such harm constitutes antitrust injury; and more. Still more discovery will be needed on the genesis and purpose of the MFN provisions at issue in Fubo's MFN claims, including the alleged relevant market, whether the Defendants have market power, whether the Defendants' MFN provisions had any effect on competition and on Fubo, the extent to which distributors like Fubo seek MFNs from programmers, and the various procompetitive benefits of MFN provisions. Much of that discovery will need to come from third parties because the appropriate inquiry is, first and foremost, the impact of Defendants' practices on competition in the overall market. Participants in the relevant markets are important potential sources of that discovery. Moreover, extensive and complicated expert discovery is required to analyze anticompetitive effects in dynamic markets like these, and to analyze any damages models Fubo may offer. Indeed, discovery in this case needs to be more extensive and more complex than even a typical antitrust case because, here, there are three different defendant groups with different practices and different factual defenses to different claims. This case really is six cases in one: tying claim against Disney; tying claim against Fox; MFN claim against Disney and Hulu; MFN claim against Fox; MFN claim against WBD; and Section 7 JV claim against Fox, Disney and WBD.

September 10, 2024

Page 4

In light of the substantial and complex discovery that remains to be taken, Defendants believe that a February 2026 trial date would offer the most reasonable (and still unusually fast) schedule, but any trial date before October 2025 simply is not achievable given the time necessary for Defendants to respond to Fubo's experts, among other reasons. Defendants therefore respectfully request that trial begin no earlier than October 2025, as set forth in Appendix A.¹ Even an October 2025 trial date is aggressive for an antitrust case of this magnitude. In this District, the median time between the filing of a complaint and trial in a private antitrust case is 59 months; 77% of cases take 35 to 107 months to reach trial.² If this case is tried in October 2025, only 20 months will have elapsed between the filing of the Complaint and the trial on the merits, despite conducting a PI hearing in the interim. The **13-month** period between today and October 2025 would be exceptionally quick for an antitrust case. Other private antitrust cases in this District took substantially longer to reach trial. See, e.g., *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 1:13-cv-07789-LGS (S.D.N.Y. Oct. 21, 2022 date of docket entry noting first day of trial) (Dkt. No. 2001) (**107 months**); *Fed. Savings Bank v. ACE Watanasuparp*, 1:15-cv-03548-AKH (S.D.N.Y. May 24, 2018) (Dkt. No. 162) (**35 months**); *Del Norte v. WorldBusiness Capital, Inc.*, 1:14-cv-10143-CM-KNF (S.D.N.Y. July 20, 2017) (Dkt. No. 227) (**29 months**); *Schutte Bagclosures Inc. v. Kwik Lok Corp.*, 1:12-cv-05541-JGK (S.D.N.Y. Dec. 14, 2015) (Dkt. No. 229) (**39 months**); *Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 1:09-cv-08578-JPO-HBP (S.D.N.Y. Aug. 21, 2014) (Dkt. No. 211) (**57 months**); *Ross v. Bank of America*, 1:05-cv-07116-WHP-JCF (S.D.N.Y. Feb. 15, 2013) (Dkt. No. 512) (**88 months**); *In re Oxycontin Antitrust Litig.*, 1:04-md-01603-SHS (S.D.N.Y. Oct. 29, 2013) (Dkt. No. 599) (**113 months**); *U.S. Philips Corp. v. Iwasaki Elec. Co.*, 1:03-cv-00172-PKC (S.D.N.Y. July 11, 2008) (Dkt. No. 221) (**65 months**); *Sanofi-Synthelabo v. Apotex Inc.*, 1:02-cv-02255-SHS (S.D.N.Y. April 26, 2007) (Dkt. No. 367) (**59 months**).

The circumstances in this case do not justify Plaintiffs' extraordinarily expedited trial schedule. This is particularly true given that the Court has granted a PI to maintain the status quo during the litigation of these claims. Each Defendant is entitled to mount its own defense based on its own factual circumstances, which means each Defendant should have the time and ability to take adequate discovery on each claim. Given all the discovery that remains to be taken—especially third-party and expert discovery—Defendants do not believe it is feasible to prepare this case for trial in a handful of months. Moreover, Fubo's proposed schedule is not only unrealistic, but also one sided. Notably, Fubo asks for more than *four months* to prepare its expert reports and then demands that Defendants submit their rebuttals within *two weeks*. Then, Fubo proposes that Defendants have a *single week* to depose Fubo's experts after receiving their reply reports. That will not suffice, particularly in light of the complex expert analysis this case demands. Finally, Defendants expect that discovery will confirm that Fubo cannot raise a triable issue of material fact to support its claims, and, therefore, Defendants intend to move for summary judgment, as contemplated by the Federal Rules of Civil Procedure. For the reasons set

¹ Defendants offered a October 2025 trial date as a compromise, between the June 2025 and February 2026 proposals, but Fubo rejected it.

² These data come from a Lex Machina search at <https://law.lexmachina.com>, on private antitrust cases in this District pending from 2009 forward, with a resolution involving trial.

September 10, 2024

Page 5

forth above, Defendants respectfully request that the Court enter Defendants' proposed schedule in Appendix A.

September 10, 2024
Page 6

Respectfully submitted,

Dated: September 10, 2024

/s/ Thomas G. Schultz
Mark C. Hansen (admitted *pro hac vice*)
Evan T. Leo (admitted *pro hac vice*)
Kevin J. Miller (admitted *pro hac vice*)
Joseph S. Hall (SDNY Bar No. JH2612)
Thomas G. Schultz (admitted *pro hac vice*)
Joshua Hafenbrack (admitted *pro hac vice*)
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, DC 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
Email: mhansen@kellogghansen.com
eleo@kellogghansen.com
kmiller@kellogghansen.com
jhall@kellogghansen.com
tschultz@kellogghansen.com
jhafenbrack@kellogghansen.com

*Counsel for Plaintiffs fuboTV Inc. and
fuboTV Media Inc.*

/s/ Antony L. Ryan
Antony L. Ryan
Joe Wesley Earnhardt
Yonatan Even
Damaris Hernández
Michael P. Addis
CRAVATH, SWAINE & MOORE LLP
375 Ninth Avenue
New York, NY 10001
Tel.: (212) 474-1000
Fax: (212) 474-3700
Email: aryan@cravath.com
wearnhardt@cravath.com
yeven@cravath.com
dhernandez@cravath.com
maddis@cravath.com

*Counsel for Defendants The Walt Disney
Company, ESPN, Inc., ESPN Enterprises, Inc.,
and Hulu, LLC*

September 10, 2024

Page 7

/s/ Andrew J. Levander

Andrew J. Levander
Steven E. Bizar
Steven A. Engel
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
Tel.: (212) 698-3500
Fax: (212) 698-3500
Email: andrew.levander@dechert.com
steven.bizar@dechert.com
steven.engel@dechert.com

Michael H. McGinley (admitted *pro hac vice*)
DECHERT LLP
Cira Center
2929 Arch Street
Philadelphia, PA 19104
Email: michael.mcginley@dechert.com

John (Jay) Jurata, Jr. (admitted *pro hac vice*)
Erica Fruiterman (admitted *pro hac vice*)
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
Email: jay.jurata@dechert.com
erica.fruiterman@dechert.com

Counsel for Defendant Fox Corporation

/s/ David L. Yohai

David L. Yohai
Adam C. Hemlock
Theodore E. Tseskerides
Elaina K. Aquila
Robert W. Taylor
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel.: (212) 310-8000
Fax: (212) 310-8007
Email: david.yohai@weil.com
adam.hemlock@weil.com
elaina.aquila@weil.com
robert.taylor@weil.com
theodore.tsekerides@weil.com

*Counsel for Defendant Warner Bros.
Discovery, Inc.*

September 10, 2024

Page 8

Appendix A.

Event	Plaintiffs' Proposal	Defendants' Proposal
Pretrial Conference	Sept. 12, 2024	Sept. 12, 2024
Parties Serve Initial Disclosures	Sept. 19, 2024	Sept. 19, 2024
Parties Serve Initial Written Discovery Requests	Sept. 12, 2024	Sept. 19, 2024
Defendants File MTDs	Sept. 26, 2024	Sept. 26, 2024
Fubo Files Opposition to MTDs	Oct. 25, 2024	Oct. 25, 2024
Defendants File Replies ISO MTDs	Nov. 13, 2024	Nov. 13, 2024
Deadline for Substantial Completion of Production of Documents in Response to Initial Requests for Production	Nov. 1, 2024	January 24, 2025
Close of Fact Discovery	Jan. 10, 2025	March 21, 2025
Deadline for All Counsel to Meet and Confer Regarding Settlement	Jan. 24, 2025	April 4, 2025
Post-Fact Discovery Conference	Jan. 24, 2025	April 4, 2025
Plaintiffs Serve Expert Reports	Jan. 27, 2025	March 28, 2025
Defendants Serve Expert Rebuttal Reports	Feb. 10, 2025	May 23, 2025
Plaintiffs Serve Expert Reply Reports	Feb. 21 2025	June 16, 2025
Close of Expert Discovery	Feb. 28, 2025	June 30, 2025
Deadline to File MSJ	Mar. 7, 2025	July 3, 2025
Deadline to File Oppositions to MSJ	Mar. 28, 2025	Aug. 1, 2026
Deadline to File Replies ISO MSJ	Apr. 11, 2025	Aug. 19, 2025
Parties File Motions in Limine (including Daubert motions)	Apr. 18, 2025	Aug. 29, 2025
Parties File Oppositions to Motions in Limine	Apr. 25, 2025	Sept. 12, 2025
Hearing on MSJ and evidentiary motions	May 7, 2025	Sept. 22, 2025
Parties Jointly File Proposed Jury Instructions, Verdict Forms, Voir Dire Questions	May 23, 2025	Oct. 6, 2025
Final pretrial conference	May 30, 2025	Oct. 20, 2025
Beginning of Trial	June 2, 2025	Oct. 27, 2025